RECORD AND BRIEFS

Supreme Court, U.S.
FILED
DEC - 9 2016
OFFICE OF THE CLERK

No. 15-118

In the Supreme Court of the United States

JESUS C. HERNANDEZ, *et al.*,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICI CURIAE* LEGAL HISTORIANS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*[1]

Each of the *amici curiae* is a professor who has taught classes and published books or articles concerning constitutional history of the United States. Certain of *amici*'s relevant publications are cited in this brief. *Amici* are:

Richard L. Aynes, Dean & Professor Emeritus and former John F. Seiberling Chair of Constitutional Law, University of Akron School of Law

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a momentary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have given blanket consent to the filing of *amicus* briefs in this case.

SUMMARY OF ARGUMENT

This case is about cross-border responsibilities of U.S. government agents. Accordingly your *amici* seek to explain the history and meaning of the Due Process Clauses as they apply to any "person."

The meaning of any person affects whether there is legal responsibility for the intentional cross-border killing of a fifteen-year old boy by a government agent who had "no reason to suspect. . . had committed any crime or engaged in any conduct that justify the use of force, let alone deadly, force," and for whose death there was "no apparent justification," *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc), adopting the statement of facts by the panel in *Hernandez v. United States*, 757 F.3d 249, 255-57 (5th Cir. 2014) although reversing the panel on the law.

The framers of the 5th Amendment Due Process Clause deliberately chose not limit it to citizens or even inhabitants, but rather used the broader language that "no person" could be deprived of life, liberty or property without due process of law.

The framers of the 14th Amendment Due Process Clause deliberately chose not limit it to citizens or even inhabitants, but rather used the broader language that "no person" could be deprived of life, liberty or property without due process of law, openly acknowledging that they had taken the language of the clause from the 5th Amendment.

Taken together, this history shows that the 5th Amendment was designed to protect the rights of both citizens and non-citizens by prohibiting the government

from acting arbitrarily or by violating the fundamental rights of any person.

ARGUMENT

I. The Fifth Amendment Due Process Clause Applies to ALL Persons

British Origins of Due Process

Professor Tribe referred to "due process" as "the famous phrase found in both the Fifth and Fourteenth Amendments." Laurence H. Tribe, *American Constitutional Law* 33-34 (3d edition, Foundation Press, N.Y., N.Y., 2000). The due process clause is commonly traced to Magna Charta, Clause 39 ("law of the land").[2] Professor Amar noted that "Prior to the adoption of the fourteenth amendment, the only major treatment of the fifth amendment due process clause was in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 276 (1855)"[3] (indicating

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[2] John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 156, Section 245 (4th ed. 1879; reprint 1997)(the fifth amendment "borrowed from Magna Charta"). The same source indicates that the "same provision is contained in the state constitutions." The term "law of the land" and the term "due process of law" stood for the same idea. *Id.* In some states the term "due course of law" is used to express the same concept as due process of law. See Ohio Constitution, Art. I, Section 16 (an injured person "shall have remedy in due course of law...") The "due course of law" provision is the equivalent of the "due process of law" provision in the Fourteenth Amendment to the United States Constitution. *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 422-23, 633 N.E. 2d 504, 511 (1994), citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70, 72. (1941)

[3] Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L. J. 1193, 1225-1226 (1992). *Amici* do not

that "due process of law" was intended to convey the same meaning as the "law of the land" in the Magna Charta). Kermit Hall, William Wiecek, and Paul Finkelman, *American Legal History* 5 (1991) in their editors' comment state that the Magna Charta "is the source of modern procedural and substantive due process" and that "law of the land" and "due process" "were equivalents."

William Lawrence (R-Ohio), who had been a lawyer, an Ohio state judge (1857-1864), editor of the *Western Law Magazine* (1859-62), six term Congressman, who would later become the First Comptroller of the U.S. Treasury (1880-85), indicated that "due process of law" and "law of the land" were "equivalent expressions," citing several cases as well as treatises by Theodore Sedgwick, Chancellor James Kent, Justice Joseph Story, and others. *Cong. Globe*, 41st Cong., 3d Sess. 1245 (1871).

One of the key analysts of the 5th Amendment Due Process Clause and proponent of the 14th Amendment Due Process Clause was John A. Bingham. (R-OH) who authored this section of the 14th Amendment, steered it through the Joint Committee on Reconstruction, was the floor manager in the House, and who gave more

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count the Court's controversial and incorrectly decided *Dred Scott v. Sanford*, 60 U.S. 397 (1857) (lead opinion of Chief Justice Taney found that federal statutes prohibiting slavery in the territories deprived the slaveholder of property without due process.) One of the nation's leading constitutional scholars, Akhil Amar, has summarized this part of Taney's opinion in just three words: "This was nonsense." This appears, along with a fuller explanation of the reasons for his conclusion in Akhil Reed Amar, *America's Constitution, A Biography* 265-66 (Random House, N.Y., N.Y, 2005).

speeches in support of the provisions than any other member of Congress. Michael Les Benedict, *A Compromise of Principle* 31-32 (W.W. Norton Co., N.Y. 1974), noted that Bingham was the 8th most senior Republican in the 40th Congress, a member of the House Committee on Reconstruction in the 39th & 40th Congresses, and its Chairman in the 40th Cong. In a list of "Prestigious Republican Members of the House" in the 38th-40th Congresses, Bingham, was one of only 11 members listed. Historian Joseph James called Bingham the "leader in the framing and ratification fight. . ." Joseph James, *The Ratification of the Fourteenth Amendment* 32 (Mercer U. Press, 1984). Further, James referred to Bingham as "the principle author of the significant first section of the [14th] amendment." *Id.* at 45. Indeed, the editor of the *Journal of the Joint Committee of Fifteen on Reconstruction*, Benjamin J. Kendrick, wrote that from 1865 on Bingham was "regarded as among the five or six leading Republican members" of the House. In speaking of Bingham's efforts to enact the provision concerning due process, equal protection, and privileges and immunities, the editor wrote that "it is not too much to say that had it not been for his untiring efforts the provisions for nationalizing civil rights would not have found a place in the fourteenth amendment." Benjamin J. Kendrick, *The Journal of the Joint Committee on Reconstruction* 184 (1914).

During the debate over the Supplementary Enforcement Act, Bingham confirmed Lawrence's view when responding to George W. Woodward (D-PA.) who was a lawyer and had served as a Justice and Chief Justice of the Pennsylvania Supreme Court, though denied confirmation when President Polk nominated

him to the U.S. Supreme Court. With his normal candor, Bingham said Woodward's interpretation amounted to "nothing" because: "It has been decided by the Supreme Court of the United States long ago, and, so far as I know, [there] is not a question by any intelligent jurist in America that the words quoted by the gentleman from your Constitution 'due process of Law' simply mean the law of the land." *Cong. Globe*, 41st Cong., 3d Sess. 1284 (1871). See also the speech of Samuel Shellabarger (R-OH), also a lawyer who served several years in Congress and later as U.S. Minister to Portugal (1869), on the Ku Klux Klan Act, citing the New York Court of Appeals decision of *Darlington v. New York*, 31 N.Y. 164, 188-89 (1865) in which Shellabarger described the Court of Appeals as "declar[ing] that" the New York statute was "identical" to a portion of the Magna Charta." *Cong. Globe*, 42nd Cong., 1st Sess. 751 (1871).[4]

Text of the clause in the Magna Charta

As originally written in 1215 and issued by King John of England, clause 39 of the Magna Charta was restricted to free men as the term was then understood. It read:

> (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against

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[4] The language reported in the *Congressional Globe* appears to be a paraphrase. The Court opinion states that "the objection of the defendants arises out of a constitutional restraint, substantially identical with one of the provisions of Magna Charta (ch. 29)," *Darlington v. Mayor of N.Y.*, 31 N.Y. 164, 188-89 (1865).

> him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

British Library, English translation of Magna Carta, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation

It was reissued in 1225 with some changes and subsequently codified in that form. The Latin text reads:

> (39). Nullus liber homo decetero capiatur vel imprisonetur aut disseisiatur de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terre.

Online Library of Liberty. http://oll.libertyfund.org/pages/1215-magna-carta-latin-and-engish (accessed 12/1/2016)

The translation of the 1225 issue reads:

> No Free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in anyway destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the

> land.—To none will we sell, to none will we deny, to none will we delay right or justice.

Online Library of Liberty, http://oll.libertyfund.org/pages/1215-magna-carta-latin-and-engish (accessed 12/1/2016)

Thus as originally written the clause protecting liberty "by the laws of the land" referred only to freemen as that term was then understood. But by 1354 the language became more inclusive:

> No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.

LII CRS Annotated Constitution (accessed 12/1/2016), https://www.law.cornell.edu/anncon/html/amdt5bfrag1_user.html#fnb4ref

Thus the British language embraced all men when New York proposed a due process clause in its New York Ratification Resolutions.

American origins of the due process clause

The proposal for a due process clause came from New York in its 1788 U.S. Constitution Ratification Resolution:

> [N]o Person ought to be taken imprisoned or disseised [sic] of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law.[5]

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[5] 2 *Documentary history of the Constitution of the United States of America, 1786-1870,* 190-203. (1894). All of the volumes for this

In the context of the post-Revolutionary era, with its emphasis on natural law and the rights of man, New York's proposal was written in that universal language, extending therefore to all persons, to protect the inborn and inalienable rights of all mankind.[6] Columbia College President William A. Duer, writing in 1868 noted that when separating from Great Britain, the colonists claimed "indubitable rights and liberties to which the respective colonies were entitled."[7] Duer noted that most of these were "natural rights."[8] But Duer also noted that while these natural rights were "indeed, common to all mankind," they were secured to British subjects by the "Magna Charta, and other fundamental laws. . ."[9]

Madison reworded the New York proposal and included the revised language in his proposed amendments to the U.S. Constitution to meet the concerns of those states which had some reservations about the absence of a formal Bill of Rights. The House of Representatives, acting upon the submissions of James Madison, sent seventeen amendments to the

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title are available in the Hathi Trust Digital Library. The link to the main record for this title is: https://catalog.hathitrust.org/Record/001141005.

[6] U.S. Declaration of Independence, 1 Stat. 2. [Emphasis added].

[7] William Alexander Duer, *A Course of Lectures on the Constitutional Jurisprudence of the United States* (1868). In this instance Duer was referring to the claims made of the Congress of 1774. *Id.* at 50.

[8] *Id.* at 51.

[9] *Id.* at 51. Duer included Blackstone's classifications of the rights of personal security, personal liberty and the right of private property, *id.*

U.S. Senate, which approved twelve of those proposed amendments. They were then submitted to the states. At the time the states approved ten of the twelve proposed, commonly referred to as the Bill of Rights. L. Tribe, *American Constitutional Law* at 8-9, n. 8. See also Paul Finkelman, "James Madison and the Bill of Rights: A Reluctant Paternity," 1990 Sup. Ct. Rev. 301.

Madison and the first Congress had knowledge of a number of then contemporary words that could have limited the protection provided by the due process clause. These included:

- "inhabitants" [Articles of Confederation, Art. 4, section 1; Ordinance of 1784; Ordinance of 1787, including Art. IV; and U.S. Constitution, Art. I, Section 2];
- "free inhabitants" [Articles of Confederation, Art. 4, Section 1; Ordinance of 1787, Art. V; U.S. Constitution, Art. I, Section 3];
- "free male inhabitants" [Ordinance of 1787];
- "residents" [Ordinance of 1784 and Ordinance of 1787];
- Aliens identified as "subject of a foreign state" [U.S. Constitution, 11th Amendment];
- "Free citizens" [Articles of Confederation, Art. 4, Section 1];
- "citizens" [Ordinance of 1787];
- "citizens of each state" [U.S. Constitution, Art. IV, Section 2];

- citizens of the United States [U.S. Constitution, Art. II, Section 1; Art. IV, Section 2]; and
- natural born citizen or a citizen at the time of the adoption of the Constitution [U.S. Constitution, Art. II, Section 1].

None of these were chosen for use in the Fifth Amendment. Rather, Madison and all those who framed and ratified the amendment used the broader and more inclusive words: "No person . . . shall be deprived of life, liberty, or property without due process of law; . . ." Article V of the Amendments of the U.S. Constitution (emphasis added). Other examples of the use of the words "No person..." include U.S. Constitution, Art. I, Section 3; Art. I, Section 9; Art. I, Section 2; Art. I, Section 6; and The Articles of Confederation Art. 5, Section 2. Further, the Articles of Confederation spoke of "any person," Art. 4, Section 2; and Article 5, Section 2. As Madison told the House of Representatives on June 8, 1789, some of his proposals "state the perfect equality of mankind." http://press-pubs.uchicago.edu/founders/documents/bill_of_rights s11.html.

The universal language of the clause reflects the importance of the right to continue to live, one of mankind's most cherished rights. All the states in the Union recognize a right to act in self-defense to protect one's life for that reason. It is also why we value and honor so highly those individuals who place their lives in peril to serve in the U.S. military, police forces, fire departments, and protect the nation. Further, this is why we honor those who gave up their lives that the nation might live.

These values are stated in the Declaration of Independence as "self-evident" truths and "inalienable," that is, rights we all have and that cannot be taken from us in other than carefully circumscribed ways. Among the "unalienable Rights" listed in the Declaration are: "Life, Liberty and the pursuit of Happiness." Logic would suggest that it is not a coincidence that "life" is listed first, since it is necessary to be alive to enjoy liberty and the pursuit of happiness.

The Universal Meaning of Due Process Was Reaffirmed in the Fourteenth Amendment

Preparation of the Due Process clause of the 14th Amendment confirms the intentional use of the words "no person" in the Fifth Amendment and "any person" in the Fourteenth to convey universal coverage of all people. John A. Bingham authored this section of the Fourteenth Amendment.

In 1862, Bingham had argued that the Fifth Amendment, properly read, prohibited slavery in the District of Columbia because the Fifth Amendment protected the life and liberty of all "persons," "whether born free or bond," "no matter whether citizens or strangers," and the Amendment thus "was a new gospel to mankind." *See Cong. Globe*, 37th Cong., 2d Sess. 1638 (1862). In fact, Bingham argued:

> "No matter upon what spot of the earth's surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether strong or weak, this new Magna Charta to mankind

> declares the rights of all to life and liberty and property are equal before the law;. . . ."

Cong. Globe, 37th Cong., 2d Sess. 1638 (April 11, 1862). See Richard Aynes, "The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment," 36 Akron L. Rev. 589, 608 (2003).

The Thirty-Ninth Congress passed the joint resolution for the Fourteenth Amendment in 1866. But earlier in that session it had limited the 1866 Civil Rights Act's protections to only "citizens." Bingham objected to the bill, and ultimately voted against it, in part because it "commit[ed] the terrible enormity" of granting protection to citizens while denying it to non-citizens:

> "The great men who made [the Fifth Amendment] when they undertook to make provision . . . for the security of the universal rights of man, abolished the narrow and limited phrase of the old Magna Charta . . . which gave the protection of the laws only to "free men" and inserted in its stead the more comprehensive words "no person;" thereby obeying that higher law given by a voice out of heaven: "Ye shall have the same law for the stranger as for one of your own country." [*Leviticus*, 24:22] Thus, in respect to life and liberty and property, the people by their Constitution declared the equality of all men, and by express limitation forbade the Government of the United States from making any discrimination . . . . Your Constitution says "no person," not "no citizen," "shall be deprived of life, liberty, or property," without due process of law." *Cong. Globe*, 39th

Cong., 1st Sess. 1292 (1866) (debate on the 1866 Civil Rights Act).

Bingham stated that he had copied the due process clause from the 5th amendment. *Cong. Globe*, 39th Cong., 2nd Sess. 1034 (1866).

When interrupted while speaking on the floor of the House of Representatives by an unfriendly question about the meaning of the due process clause from Democratic Representative and Joint Committee on Reconstruction member, Andrew Jackson Rogers (D-N.J.), who later voted against the adoption of the Fourteenth Amendment, Bingham's terse response indicated that it was identical to that of the fifth amendment: "courts have settled that long ago, and the gentleman can go and read their decisions." *Cong. Globe*, 39th Cong., 1st Sess. 1088 (1866). According to Professor Amar, "In 1866, the definitive statement of the meaning of the Fifth Amendment's due process clause was the decade-old case of Murray's Lessee v. Hoboken Land & Improvement Co. . . ." Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L. J. 1193, 1225-1226 (1992).

Indeed, in a February 1866 speech concerning an earlier version of the 14th amendment, Bingham said that "every word" in that version of the amendment, except for the enforcement clause, was already in the Constitution and made specific reference to the due process clause of the 5th Amendment, which he quoted. *Cong. Globe*, 39th Cong., 1st Sess., 1034 (1866). Portions of this exchange were quoted by seven-term Congressman John F. Farnsworth(R-Ill.) and lawyer in an 1871 debate. *Cong. Globe*, 42nd Cong., 1st Sess. Appendix 125 (1871). This same point was made by the

Chair of Senate Judiciary Committee, Lyman Trumbull (R-Ill) indicated that the due process clause of the 14th amendment was the same as that of the 5th amendment and the major change was that it was now to be enforced against the states. *Cong. Globe*, 42nd Congress, 1st Sess. 577 (1871)(discussion of KKK Act).

In drafting Section 1 of the Fourteenth Amendment, Bingham borrowed the expansive term "person" from the Fifth Amendment in order to extend protections equally to "all persons, whether citizens or strangers." *Id.* at 1090 (debate on the Fourteenth Amendment).

Bingham also drafted the Equal Protection Clause of the Fourteenth Amendment so that it required equal protection of all "persons" rather than only all "citizens," intentionally advancing human rights beyond Great Britain's Magna Charta, which protected the rights of only "freemen."[10]

In the subsequent debate on the joint resolution for the Fourteenth Amendment, Bingham similarly asserted that, in using the term "persons," the clause guaranteed that "all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and

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[10] Early drafts of what became the equal protection clause of the Fourteenth Amendment guaranteed equality only to "citizens." Bingham intentionally changed the word "citizen" to "person." *Cong. Globe*, 40th Cong., 1st Sess. 542 (1867) ("By that great law of ours it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty.").

liberty and property." *Cong. Globe*, 39th Cong., 1st Sess. 1090 (February 28, 1866). The term "strangers" was a Biblical one meaning aliens. See Exodus 22:21[11]

Thus, it is not surprising that these two identical phrases are treated as being identical by this Court. Justice Frankfurter wrote that: "To suppose that 'due process' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejections." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring). Especially because the Framers of the Fourteenth Amendment drew on the Fifth Amendment for the meaning of the term "person," that term should be given the same interpretation when courts construe the Fifth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010) (the understanding of Bill of Rights by those involved in its creation is "powerful evidence" of their proper scope and meaning). With respect to fundamental rights—such as the right to life—the Founders and Framers established a strong presumption that the Fifth Amendment treats citizens and non-citizens equally. It should also be noted that this is a term which is also gender neutral, applying to both men and women.

In July 1867, during a debate over Reconstruction, Congressman John A. Bingham pointed out the "marked difference" between some versions of the "Magna Charta of England . . . and the Magna Charta

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[11] (United States Conference of Catholic Bishops version)("You shall not oppress or afflict a resident alien, for you were once aliens residing in the land of Egypt.") (King James): ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.")

of the United States" which was how he referred to the Fifth Amendment due process clause. He noted that by providing protection to "freeman" the English Magna Charta excluded one-half of the population of England at the time it was adopted. Then Bingham pointed out that the fifth amendment of the United States had no such limitation, because the Fifth Amendment, reads instead "no person shall. . ." To make the point clear, Bingham proceeded to indicate that under U.S. law the inquiry was not whether one was "free", but rather only whether one "was a man. . ."

> "It is not to be inquired, sir, when any man invokes the majesty of American law in defense of his rights, whether a European, an African, or an Asiatic sun first looked down upon him . . . Before the great law the only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. . ."

Cong. Globe, 40th Cong., 1st. Sess. 542 (1867).

The history of the due process clauses confirms that substantive due process guarantees, as applied to fundamental rights, extend equally to citizens and non-citizens. In making this guarantee applicable to the States, the Framers of the Fourteenth Amendment insisted that the term "person" generally prohibits any distinction between citizens and non-citizens as to fundamental rights.

II. Dual Roles of the Due Process Clauses

Both the Fifth and Fourteenth Amendment Due Process Clauses perform two separate tasks: (1) they attempt to protect individuals (2) by restraining the government and its agents. As this Court articulated in *Daniels v. Williams*, 474 U.S. 327, 331-332 (1986), "the Due Process Clause, like its forebear in the Magna Charta," see [Edwin S.] Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was "intended to secure the individual from the arbitrary exercise of the powers of government," *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819)). *See also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)"); . . . By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *e.g.*, *Rochin* [*v. California*, 342 U.S. 165 (1952)(pumping a suspect's stomach] it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment)." (emphasis added) Similarly, Justice William Johnson, in *Bank of Columbia v. Okey*, 17 U.S. (4 Wheat.) 235, 244 (1819) wrote that when the words of the Magna Charta were inserted into the Maryland Constitution,

"they were intended to secure the individual from the arbitrary exercise of the powers of government. . ."

The Bill of Rights was designed as a two-edged sword: it not only provides protection for individuals, it also provides that protection by restraining government actors. As Chief Justice John Marshall wrote in *Barron v. Baltimore,* 32 U.S. 243, 247 (1833):

> "The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes."
>
> "If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government." (emphasis added).

Thus the Due Process Clause both protects the potential victim and restrains the government agent.

CONCLUSION

The due process clauses of the U.S. Constitution were deliberately inclusive so that everyone is protected from arbitrary and harmful action of the government or its agents. The language of the Fifth Amendment provides no basis for exclusion of responsibility for shooting by a U.S. agent of the federal government on U.S. soil of a Mexican national nearby, on the other side of the border in an area under constant surveillance by U.S. border agents. The killing of a fifteen-year-old boy by a government agent without reason to suspect any cause for the use of deadly force is the very definition of the "arbitrary exercise of government power."

Because the very purpose of the 5th Amendment due process is to prevent such arbitrariness by a government agent, one goal of the U.S. Constitution's 5th Amendment is to hold the agent accountable for his arbitrary and unjustified action. The Fifth Amendment is not limited in its application to citizens and, indeed, contemplates protecting all "person[s]."

Respectfully Submitted,

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